CFPB Director Held Subject to Dismissal at Will by President; Court Also Reinstates Traditional View of RESPA Section 8 Allowing Reasonable Fees for Services Rendered

On October 11, 2016 the federal appeals court for the D.C. Circuit held that the CFPB director must be subject to dismissal by the president to avoid an otherwise unconstitutional delegation of excessive power to one individual. In *PHH Corp. v. CFPB*, 2016 U.S. App. LEXIS 18332 (D.C. Cir Oct. 11, 2016), the United States Court of Appeals for the District of Columbia Circuit held that Congress overstepped its bounds when it conferred great authority on the CFPB in the Dodd-Frank Act while vesting all of it in the hands of one director who could only be dismissed "for cause." The court explained that executive branch officers were historically subject to dismissal by the president at will. Only later in the 20th century did courts begin to accept the existence of independent regulatory agencies, such as the FTC and SEC, that are governed by commissions made up of multiple individuals. While such individuals can only be dismissed for cause, they cannot exercise unlimited authority because the multi-member structure itself acts as a check on the arbitrary exercise of individual power.

The CFPB's structure failed this test because its director, as originally established by the Dodd-Frank Act, has plenary authority over the agency but can only be dismissed for cause. This was too much power in the hands of one individual according to the court. The court's solution was to strike the "for cause" dismissal provision as to the CFPB director, thereby rendering him or her subject to dismissal at will by the president (like cabinet officers and other government officials). The court declined to disassemble the CFPB altogether as PHH had requested.

The case is important for constitutional scholars but actually preserves the basic structure of the CFPB and all of its rules and other powers. Whether any future president decides to replace Director Richard Cordray will be up to that person. The significant RESPA aspects of the case are discussed below.

The *PHH* case discussed above was also important (perhaps more so for financial institutions in the long run) because of its holding regarding Section 8 of RESPA. The *PHH* case involved penalties the CFPB had assessed against PHH

18500 von karman avenue, suite 300, irvine, california 92612
phone: (800) 742-3600 • fax: (949) 474-0617
email: bcg@ablawyers.com • website: www.bankerscompliancegroup.com

Mortgage for referrals made by lenders to a "captive" reinsurance company controlled by PHH. In its original order assessing $109 million in penalties against PHH (which is a lot), the CFPB had expressly overruled a former HUD interpretation of Section 8 which had permitted captive reinsurance arrangements so long as the premiums paid for the reinsurance did not exceed the reasonable value of the reinsurance.

HUD stated that such payments were allowed under Section 8(c) of RESPA which provides that "Nothing in [Section 8] shall be construed as prohibiting … the payment to any person of a *bona fide* salary or compensation or other payment for goods or facilities actually furnished or for services actually performed." Mortgage lenders will recognize this provision as underpinning a lot of other mortgage practices, including paying mortgage brokers for services rendered, not for the referral of the customer.

The CFPB had overruled the HUD position and instead ruled that there could be no connection between the reinsurance and mortgage referrals at all or else a Section 8 violation would arise. On top of the reversal of HUD's position, the CFPB applied its new interpretation to PHH retroactively in assessing its $109 million fine.

The court of appeals strongly disagreed with the CFPB's interpretation of Section 8, saying "We agree with PHH that Section 8 of the Act allows captive reinsurance arrangements so long as the amount paid by the mortgage insurer for the reinsurance does not exceed the reasonable market value of the reinsurance." It is possible that other fee-for-service arrangements, such as mortgage brokerage, have been saved by this holding as well as captive reinsurance arrangements.

The court also held that RESPA's regular three-year statute of limitations applied to any CFPB enforcement action, whether brought in court or in an administrative proceeding. Thus, while the case was remanded back to the CFPB for reconsideration of the question whether the reinsurance premiums paid to the PHH reinsurer exceeded the market value of the reinsurance, the inquiry must be limited to actions that occurred no further back than three years before the enforcement action began.